Public Prosecutor v Mohd Sairi bin Abdul Samat

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–243(B) OF 2009
LINTON ALBERT, AZIAH ALI AND MOHTARUDIN BAKI JJCA
28 JUNE 2013

Criminal Procedure — Appeal — Appeal against acquittal — Three drugs offences — Drugs discovered during surveillance — Incriminating drugs found in motorcar and room — Whether room was locked — Whether accused had access to room — Whether there were other occupants of room — Whether room accessible to all occupants in house — Whether defence afterthought — Whether prosecution proved case beyond reasonable doubt — Whether safe to acquit and discharge accused — Dangerous Drugs Act 1952 ss 12, 39A & 39B(1)(a)

The appellant was charged with three offences under the Dangerous Drugs Act 1952 ('DDA') namely under ss 39B(1)(a), 39A and 12. Surveillance was carried out on a house when a motorcar stopped under a garage next to the said house. SP4 and his police team approached the motorcar and a body search conducted on the appellant revealed one plastic package containing compressed dried leaves suspected to be cannabis. Further package containing compressed dried leaves suspected to be cannabis was also recovered from the car. As a result of interrogation of the appellant, the appellant led the police inside the house. There were two rooms. The door to one of the rooms was not locked. From underneath a single bed, one dark coloured bag containing five transparent plastic packages of compressed dried leaves suspected to be cannabis was retrieved. After removing a drawer inside a cupboard, SP4 recovered one transparent plastic package underneath the drawer. According to the police, they would not have found this package without information from the appellant. The prosecution averred that the appellant's brother ('SP10') occupied the room together with the appellant. SP10 testified that things that belonging to him, the appellant and his other brother were kept in the room which was not locked and was accessible to all the occupants in the house. The appellant submitted that one day prior to his arrest, a friend ('Kamal') had stayed over at his house and slept in the said room. He had borrowed the car from Kamal that evening in order to fetch his mother. With regard to 'Kamal', the High Court found that the appellant's testimony that his friend 'Kamal' had stayed overnight in the room was probably true. Based on evidence that the appellant did not have sole access to the room, the High Court found that the appellant's denial of knowledge of the drugs was probably true. Consequently the learned judge found that the prosecution had failed to prove its case beyond reasonable doubt and the appellant was acquitted and discharged. In the present appeal, the prosecution submitted that the evidence showed possession

per se and that the appellant knew of the existence of the drugs. It was submitted that the appellant's evidence about 'Kamal' was an afterthought because 'Kamal' was not mentioned during the prosecution's case. It was further submitted that only the appellant who had occupied the room would hide the drugs there.

Held, dismissing the appeal:

(1) Even though it was established that the appellant was the occupier of the room, mere occupation of the room per se was insufficient to prove custody and control and possession of the drugs. There was evidence that the appellant's family members, his friends and his brother's friends also had access to the room. Even if the evidence regarding 'Kamal' was rejected, the prosecution had failed to exclude the possibility of others having access to the room and the cupboard. Custody implied knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession (see para 13).

(2) The appellant not only did not have sole access to the room but he probably also did not have sole access to the cupboard. There was insufficient evidence to find that the appellant had custody and control of all the packages recovered from his room. Even if there was proof of custody and control, it would not be sufficient to establish possession. The prosecution had to establish beyond reasonable doubt that the appellant had not only custody and control but also knowledge of the drugs, but knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking (see para 13).

(3) The learned judge had not invoked the aid of the statutory presumption of knowledge under s 37(d). Thus knowledge had to be proved either by direct evidence or circumstantial evidence. The testimonies of SP4 and SP6 showed that the drugs were discovered as a result of interrogation of the appellant. However, knowledge of the place where the drugs were hidden did not necessarily constitute possession by the appellant unless there was further evidence produced by the prosecution that it was the appellant who had hidden the drugs there. At the most, it showed that he had knowledge where the drugs were kept or concealed (see para 14).

(4) There was no clear evidence that SP4 had recovered the drugs because the appellant had told him that he had hidden the drugs in the room. There was a doubt whether the appellant had custody and control of the drugs and he had concealed them in the room or whether he merely had knowledge of the presence of the drugs in the room (see para 14).

(5) The defence raised by the appellant was reasonable and probable and sufficient enough to rebut the presumption under the DDA. For the

reasons stated, the court agreed with the learned judge and affirmed the High Court's decision to acquit and discharge the appellant of the offence of trafficking (see para 15).

[Bahasa Malaysia summary

Perayu telah dituduh dengan tiga kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB') khususnya di bawah ss 39B(1)(a), 39A dan 12. Pengawasan sedang dijalankan ke atas sebuah rumah apabila sebuah motokar berhenti di bawah garaj bersebelahan dengan rumah tersebut. SP4 dan pasukan polisnya mendekati motokar tersebut dan pemeriksaan badan yang dijalankan ke atas perayu mendedahkan satu bungkusan plastik yang mengandungi daun-daun kering mampat yang disyaki kanabis. Bungkusan selanjutnya yang mengandungi daun-daun kering mampat disyaki kanabis turut dijumpai dalam kereta tersebut. Hasil soal siasat ke atas perayu, perayu membawa polis masuk ke dalam rumah tersebut. Terdapat dua buah bilik. Pintu salah satu daripada dua bilik tersebut tidak berkunci. Daripada bawah katil bujang, satu beg berwarna gelap yang di dalamnya terdapat lima bungkusan plastik lutsinar mengandungi daun-daun mampat yang disyaki kanabis telah ditemui. Selepas mengeluarkan laci daripada dalam sebuah almari, SP4 menemui satu bungkusan plastik lutsinar di bawah laci tersebut. Menurut pihak polis, mereka tidak mungkin menjumpai bungkusan ini tanpa maklumat daripada perayu. Pihak pendakwaan menghujahkan bahawa saudara lelaki perayu ('SP10') menghuni bilik tersebut bersama-sama dengan perayu. SP10 memberi keterangan bahawa barang-barang yang dimilikinya, perayu dan seorang lagi saudara lelakinya disimpan dalam bilik tersebut yang mana tidak berkunci dan boleh dimasuki oleh kesemua penghuni dalam rumah tersebut. Perayu menghujahkan bahawa sehari sebelum penangkapannya, seorang kawan ('Kamal') telah tinggal di rumahnya dan tidur di dalam bilik tersebut. Dia telah meminjam kereta Kamal pada petang tersebut untuk menjemput ibunya. Berkenaan 'Kamal', Mahkamah Tinggi memutuskan bahawa keterangan perayu bahawa kawannya 'Kamal' telah tinggal semalam di dalam bilik tersebut adalah mungkin benar. Berdasarkan keterangan bahawa perayu tidak mempunyai satu-satunya akses kepada bilik tersebut, Mahkamah Tinggi memutuskan bahawa penafian perayu ke atas dadah-dadah tersebut berkemungkinan benar. Dengan itu, hakim memutuskan bahawa pihak pendakwaan gagal untuk membuktikan kes tersebut melampaui keraguan munasabah dan perayu dibebaskan dan dilepaskan. Dalam rayuan ini, pihak pendakwaan menghujahkan bahawa keterangan dengan sendirinya menunjukkan milikan dan bahawa perayu tahu akan kewujudan dadah-dadah tersebut. Dihujahkan bahawa keterangan perayu mengenai 'Kamal' adalah satu yang difikir semula kerana 'Kamal' tidak disebut semasa kes pendakwaan. Dihujahkan lagi bahawa hanya perayu yang menghuni bilik tersebut yang akan menyembunyikan dadah-dadah tersebut di situ.

Diputuskan, menolak rayuan:

(1) Walaupun telah dibuktikan bahawa perayu merupakan penghuni bilik

tersebut, menghuni bilik itu semata-mata tidak cukup untuk membuktikan jagaan, kawalan dan milikan dadah-dadah. Terdapat keterangan bahawa ahli-ahli keluarga perayu, kawan-kawannya dan kawan-kawan saudara lelakinya juga mempunyai akses kepada bilik tersebut, walaupun keterangan mengenai 'Kamal' telah ditolak, pihak pendakwaan gagal untuk menyangkal kemungkinan bahawa orang lain mempunyai akses kepada bilik dan almari tersebut. Jagaan menunjukkan pengetahuan kewujudan dan tempat beradanya barang-barang dan kuasa untuk mengawalnya, tidak terjumlah kepada milikan (lihat perenggan 13).

(2) Perayu tidak mempunyai satu-satunya akses kepada bilik tersebut tetapi dia juga mungkin tidak mempunyai satu-satunya akses kepada almari tersebut. Tidak cukup keterangan untuk memutuskan bahawa perayu mempunyai jagaan dan kawalan terhadap bungkusan-bungkusan yang dirampas dari biliknya. Walaupun terdapat bukti jagaan dan kawalan, ia tidak cukup untuk membuktikan milikan. Pihak pendakwaan perlu membuktikan melampaui keraguan munasabah bahawa perayu bukan sahaja mempunyai jagaan dan kawalan tetapi juga kawalan ke atas dadah, tetapi pengetahuan sahaja tanpa sifat eksklusif sama ada jagaan atau kawalan fizikal atau kedua-duanya sekali tidak cukup, di bawah undang-undang untuk membentuk milikan, apatah lagi pengedaran (lihat perenggan 13).

(3) Hakim tidak membangkitkan anggapan statutori pengetahuan di bawah s 37(d). Oleh itu, pengetahuan haruslah dibuktikan sama ada melalui keterangan langsung atau keterangan ikut keadaan. Keterangan-keterangan SP4 dan SP6 menunjukkan bahawa dadah-dadah tersebut dijumpai hasil daripada soal siasat ke atas perayu. Walau bagaimanapun, pengetahuan mengenai tempat dadah-dadah tersebut disembunyikan tidak semestinya membentuk milikan oleh perayu melainkan terdapat keterangan lanjut yang dikemukakan oleh pihak pendakwaan bahawa perayu yang telah menyembunyikan dadah-dadah tersebut di situ. Paling tidak, ia menunjukkan bahawa dia mempunyai pengetahuan di mana dadah-dadah tersebut disimpan atau disembunyikan (lihat perenggan 14).

(4) Tiada keterangan jelas bahawa SP4 telah menjumpai dadah-dadah tersebut kerana perayu memberitahunya dia telah menyembunyikan dadah-dadah tersebut di dalam bilik. Terdapat keraguan sama ada perayu mempunyai jagaan dan kawalan ke atas dadah-dadah tersebut dan dia menyembunyikan kesemuanya di dalam bilik atau sama ada dia setakat mempunyai pengetahuan mengenai kewujudan kesemuanya di dalam bilik (lihat perenggan 14).

(5) Pembelaan yang dibangkitkan oleh perayu adalah munasabah dan berkemungkinan dan cukup untuk menyangkal anggapan di bawah

ADB. Atas sebab-sebab yang dinyatakan, mahkamah bersetuju dengan hakim dan mengesahkan keputusan Mahkamah Tinggi untuk melepaskan dan membebaskan perayu atas kesalahan pengedaran (lihat perenggan 15).]

Notes

For cases on appeal against aquittal, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–206.

Cases referred to

Choo Yoke Choy v PP [1992] 2 MLJ 632; [1992] 1 CLJ Rep 43; [1992] 4 CLJ 1791, SC (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)

Ibrahim bin Mohamad dan satu lagi lwn PP [2011] 6 MLJ 387; [2011] 4 CLJ 113, CA (refd)

Leow Nghee Lim v Reg [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)

Pang Chee Meng v PP [1992] 1 MLJ 137; [1992] 1 CLJ Rep 265; [1992] 1 CLJ 39, SC (refd)

PP v Khoo Boo Hock & Anor [1990] 2 CLJ (Rep) 716, HC (refd)

Yee Ya Mang v PP [1972] 1 MLJ 120; [1971] 1 LNS 156 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12, 37(d), (da), 39A, 39B, (1)(a)

Appeal from: Criminal Trial No 45–34 of 2007 (High Court, Kuala lumpur)

Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Mohd Ridzuan bin Muhamad (Mohd Fadzli & Co) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The respondent, Mohd Sairi bin Abdul Samat was charged with three offences under the Dangerous Drugs Act 1952 ('the DDA'). He was charged for an offence under s 39B(1)(a) with trafficking in 5,464g of cannabis, a dangerous drug as defined under s 2 of the DDA. He was also charged for two other offences under ss 39A and 12 respectively. At the conclusion of the trial the respondent was acquitted and discharged of the offence under s 39B but was convicted on the two charges under ss 39A and 12. He was sentenced to 16 years' imprisonment and ten strokes of the *rotan* for the offence under s 39A and to one year's imprisonment for the offence under s 12.

[2] The public prosecutor appealed to this court against the decision of the High Court to acquit and discharge the respondent of the offence under s 39B

whilst the respondent appealed against the sentences imposed upon him for the offences under ss 39A and 12. We heard the appeals simultaneously. Having considered the appeal records and submissions of learned deputy public prosecutor ('DPP') and learned assigned counsel for the respondent, by a unanimous decision we dismissed the public prosecutor's appeal against the decision of the High Court to acquit and discharge the respondent in respect of the offence under s 39B and we also dismissed the respondent's appeal against the sentences imposed by the High Court. The public prosecutor is dissatisfied with our decision in affirming the decision of the High Court to acquit and discharge the respondent of the offence under s 39B.

BACKGROUND FACTS

[3] The salient facts showed that on 16 December 2006 at about 10.30pm SP4, ASP Zulkefli bin Kamis and six other members of his team including SP6, D/Cpl Zainal bin Hasan conducted a surveillance on a house No 51A-5, Pintasan Raja Muda Musa 4, Kg Baru, Kuala Lumpur when at about 11pm they saw a green-coloured Proton Satria motorcar stopped under a garage next to the said house. The motorcar was driven by the respondent with Muhamad Isha bin Mukisan ('SP8') as passenger. SP4 and his team members approached the motorcar. SP4 together with SP6 pulled the respondent out of the vehicle while two other team members pulled out SP8. According to SP8 when he and the respondent arrived at the respondent's house, he got out of the car and someone identified himself as the police and pushed him back into the car. He was asked whether he was 'Sairi' and he replied that he was not. Then the police checked the car and the respondent and drugs were found inside the car and on the respondent.

[4] A body search on the respondent was conducted by SP4 and from the rear left pocket of the trousers worn by the respondent (exh P17) he recovered one plastic package containing compressed dried leaves suspected to be cannabis. SP4 also recovered one Nokia handphone (exh P28) and two keys from the right front pocket of the trousers worn by the respondent (exh P29A and B). A body search conducted on the passenger SP8 revealed nothing incriminating.

[5] An inspection of the car was carried out and from the pocket of the door on the driver's side SP4 recovered one package wrapped in Malay language newspaper inside which was compressed dried leaves suspected to be cannabis wrapped in transparent plastic. Underneath the passenger seat SP4 recovered one 500ml 100 Plus bottle (exh P20F) containing dark coloured liquid suspected to be cough mixture. The aforementioned facts formed the basis for the charges under ss 39A and 12 preferred against the respondent.

[6] In respect of the facts which are relevant to this appeal, SP4 testified that

as a result of interrogation of the respondent, he together with SP6 and the respondent went to the house and used the keys recovered from the respondent to open the iron grill door and the wooden door to the house. SP4 and SP6 entered the house together with the respondent. SP8 was left outside the house guarded by two other members of his team. There were two rooms in the house and both SP4 and SP6 together with the respondent entered one of the rooms (exh P6F). The door to the room was not locked. In the room were two beds, a single bed and a double decker bed. Pursuant to interrogation of the respondent, SP4 retrieved from underneath the single bed one dark coloured bag with the name 'Timberland' (exh P21). According to SP6 this bag was not visible upon entry to the room because it was concealed from view by the bed sheet. The bag was closed and SP4 opened the zip and inside the bag were five transparent plastic packages containing compressed dried leaves suspected to be cannabis. Four of the packages were tied with blue coloured tape and one package was tied with red coloured tape (exh P5D, 5B, 5F, 5H and 5J). Again pursuant to interrogation of the respondent SP4 removed a drawer inside a cupboard and on the floor underneath the drawer SP4 recovered one transparent plastic package tied with red coloured tape (exh P5L) also containing compressed dried leaves suspected to be cannabis. According to SP6 they would not have found this package without information from the respondent. SP4 then searched the other room which door was also not locked. He also searched the living room and the kitchen. Nothing was recovered. SP4 seized the items recovered and SP4 then closed the door of the room from where the packages were recovered. He locked the house and they all left for the Kuala Lumpur Police Contingent Headquarters. There SP4 weighed and marked the items seized. He then took the seized items and the respondent and SP8 to the narcotics office at the Dang Wangi Police District Headquarters where he handed the items seized and the respondent and SP8 to SP12, the investigating officer ('IO') Insp Suraya Hany Abd Rahim. Both SP4 and SP12 signed the *Surat Akuan Serah Menyerah* (exh P15) in respect of items seized from inside the car and another form in respect of items seized from the house (exh P16). On 19 December 2006 SP4, SP12 and the photographer SP2 visited the house where SP2 took photographs (exh P6A–6F). SP12 also took four other photographs of the crime scene. At the Tun HS Lee Police Station he took three photographs of the Proton Satria car. At the office of the IO he took two photographs of the drugs (exh P7 and P13). Only he and the IO were present when exh P7 was taken. According to the IO the Proton Satria car was registered in the name of one 'Encik Mahadi'. The contents of the six packages recovered from the room in the house were sent to the Chemistry Department. The chemist SP1 Shadiah bt Mohammad carried out an analysis and found the six packages contained a total of 5,464g of the dangerous drugs cannabis. SP1 prepared a report (exh P4). These facts formed the basis for the charge under s 39B.

[7] The prosecution called SP10 the respondent's brother who testified in

cross-examination that he occupied the room together with the appellant. They have another brother named Mohd Shahril who would also occupy the same room whenever he came to the house. SP10 testified that in the said room were kept things that belonged to him, the respondent and his other brother Shahril. The room was not locked and was accessible to all the occupants in the house. The appellant's friends would also occupy the same room when they stayed over. The respondent's mother, SP11 testified that there was only one key to the house and the appellant did not have any key to the house. She had gone to Cameron Highlands and had taken the house key with her. The house was left unlocked. She was not home when the police arrested the respondent.

FINDINGS BY THE HIGH COURT

[8] The learned trial judge found that the prosecution had proved a prima facie case against the respondent and ordered the respondent to enter his defence. In his grounds of judgment the learned judge disbelieved the evidence of the respondent's mother that she had left the house unlocked to go to Cameron Highlands as nonsensical and unreasonable. In His Lordship's view the testimony of SP11 that she held the only key to the house and had left for Cameron Highlands leaving the house unlocked was for the purpose of creating a doubt on the testimony of SP4 that he had unlocked the door to the house using the key recovered from the appellant. His Lordship accepted the evidence of the appellant's brother SP10 that the respondent occupied the room from where SP4 recovered the drugs and this room was not locked. Despite the absence of direct evidence that it was the respondent who had kept the drugs in the room, His Lordship drew an inference that it must have been the respondent who had placed the drugs in the room because he was the occupier of the room. Therefore His Lordship found that the respondent had custody, control and knowledge of the drugs and that the prosecution had proved that the respondent had possession of the drugs. His Lordship did not rely on s 37(d) for presumed knowledge. Based on the weight of the drugs His Lordship invoked the presumption of trafficking under s 37(da) of the DDA.

THE DEFENCE CASE

[9] The defence case was that the respondent ('SB1') did not have sole access to the room. According to the respondent the room was also occupied by his brother SP10 and the other brother. The room was accessible to his friends and his brothers' friends whenever they came to the house. He allowed his close friends to sleep in the room whenever they stayed overnight. When his friends slept in the room, his brother would sleep in their mother's room. One day prior to his arrest a friend of his by the name of 'Kamal' had stayed over at his house and slept in the said room. When he left for work at 7am the next day to help his uncle who runs a restaurant at the weekly market, Kamal was still

asleep. Kamal also had a restaurant business in Taman Samudera. He had borrowed the Proton Satria car from Kamal that evening in order to fetch his mother. The respondent denied that he did not inform the IO about Kamal. He denied that his story about Kamal was an afterthought. The bed under which the drugs were recovered was not the bed that he usually slept in. He slept on the other bed in the room.

[10] According to the respondent in the house he was asked by SP4 which of the two rooms was his room. He showed them his room and then members of SP4's team entered the room. Approximately ten minutes later he was brought into the room. In the room he saw that the condition of the room was disorderly with clothes left on the floor and the cupboard opened. One of the police personnel then showed him a bag under a bed and told him that the bag contained drugs. According to the respondent that was the first time that he saw the bag. He also saw something else under the cupboard's drawer. The respondent testified that he did not know the owner of the bag and neither did he know about the drugs. He denied that the drugs belonged to him. The respondent denied that the police recovered the house key from him. According to him the door to the house was not locked and the house key was with his mother.

[11] In evaluating the defence evidence the learned judge accepted the testimonies of the appellant's brother SP10 and his mother SP11 that the room occupied by the respondent was not locked and was accessible to other family members and to the respondent's friends who would lounge around in his room whenever they came to the house and were also allowed to stay overnight in the room. The learned judge found that the presence of more than one bed in the room was consistent with evidence that more than one person could sleep in the room at any one time. Further His Lordship also accepted the evidence that the respondent's family members also kept their things in the room. With regard to 'Kamal', His Lordship found that the respondent's testimony that his friend 'Kamal' had stayed overnight in the room was probably true. Based on evidence that the appellant did not have sole access to the room His Lordship found that the appellant's denial of knowledge of the drugs was probably true. Consequently the learned judge found that the prosecution had failed to prove its case beyond reasonable doubt and the respondent was thereupon acquitted and discharged.

THE APPEAL

[12] Learned DPP submitted that the evidence showed possession per se and that the appellant knew of the existence of the drugs. His brother SP10 had denied knowledge of the drugs and the appellant's sister and the other brother were at the material time not residing in the house. It was submitted that the

appellant's evidence about 'Kamal' was an afterthought because 'Kamal' was not mentioned during the prosecution's case. It was the DPP's submission that only the appellant who had occupied the room would hide the drugs there.

[13] We were of the view that even though it was established that the respondent was the occupier of the room, mere occupation of the room per se was insufficient to prove custody and control and possession of the drugs. In the case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 the appellant was charged under s 39B(1)(a) of the DDA with trafficking in 22,469g of heroin which was found in his rented room. At the trial it was established that his girlfriend also had a set of keys to his room and that she had used the bedroom as her own, that she shared the same bed there with the appellant, on the average for one or two nights a week. The appellant's landlord testified that after the room was let to the appellant, his girlfriend who was introduced to the landlord as the appellant's wife, had also slept in the room. Edgar Joseph Jr SCJ in delivering the judgment of the Supreme Court said, inter alia:

> … even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there.

Similarly in the present appeal there was evidence that the respondent's family members, his friends and his brother's friends also had access to the room. SP11 had testified that the respondent's brother had also kept his clothes in the respondent's room. We were of the view that even if the evidence regarding 'Kamal' was rejected, the prosecution had failed to exclude the possibility of others having access to the room and the cupboard. Custody implies knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession. In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53 Taylor J said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and the power of control over them, not amounting to possession.

The respondent not only did not have sole access to the room but he probably also did not have sole access to the cupboard. Hence there was insufficient evidence to find that the respondent had custody and control of all the packages recovered from his room. Even if there was proof of custody and control, it would not be sufficient to establish possession. The prosecution had

to establish beyond reasonable doubt that the respondent had not only custody and control but also knowledge of the drugs, but knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking, (see *Ibrahim bin Mohamad dan satu lagi lwn Public Prosecutor* [2011] 6 MLJ 387; [2011] 4 CLJ 113).

[14] The learned judge had not invoked the aid of the statutory presumption of knowledge under s 37(d). Thus knowledge had to be proved either by direct evidence or circumstantial evidence. The testimonies of SP4 and SP6 showed that the drugs were discovered as a result of 'soalsiasat' of the respondent. It was contended by the DPP that this showed that the respondent had knowledge of the drugs in the room. However we were of the considered view that knowledge of the place where the drugs were lying hidden did not necessarily constitute possession by the respondent unless there was further evidence produced by the prosecution that it was the respondent who had hidden the drugs there. At the most it showed that he had knowledge where the drugs were kept or concealed. In the case of *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120; [1971] 1 LNS 156 Sharma J said:

> When, however, the accused without stating that he had concealed those articles merely produces them from a place to which other people could have access, it would not be sufficient to establish his possession even though the articles may be found carefully concealed and hidden because that is quite consistent with any other person having done so and the accused might merely have knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there.

We had perused the evidence and found that it did not show what was the true substance of the information given by the respondent to SP4. There was no clear evidence that SP4 had recovered the drugs because the respondent had told him that he had hidden the drugs in the room. Thus we find that there was a doubt whether the respondent had custody and control of the drugs and he had concealed them in the room or whether he merely had knowledge of the presence of the drugs in the room (see *Public Prosecutor v Khoo Boo Hock & Anor* [1990] 2 CLJ (Rep) 716; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ Rep 265; [1992] 1 CLJ 39 (SC); *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632; [1992] 1 CLJ Rep 43; [1992] 4 CLJ 1791).

[15] It is trite law that the court need not be convinced of the defence story to entitle the accused to an acquittal. The burden of proof on the accused is indeed a light one which is merely to cast a reasonable doubt on the prosecution's case. Having perused the evidence we find that the defence raised by the respondent was reasonable and probable and sufficient enough to rebut

the presumption under the DDA. For the reasons stated we agreed with the learned judge and affirmed His Lordship's decision to acquit and discharge the respondent of the offence of trafficking.

Appeal dismissed.

Reported by Afiq Mohamad Noor